Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

BRANDON HEIN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Seven

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Penal Code section 190.2, subdivision (d) is unconstitutionally vague and overbroad under the Fifth, Eighth and Fourteenth Amendments both facially and as applied to Brandon Hein in that it is arbitrary, over inclusive, fails to properly narrow the class of offenders eligible for death, is violative of the equal protection clause and fails to meet substantive due process requirements. This case does not involve the type of conduct contemplated by *Tison v. Arizona*, 481 U.S. 137 [107 S.Ct. 1676, 95 L.Ed.2d 127] (1987) so as to render a defendant, who has neither killed nor intended that anyone be killed, death eligible.

2. Whether repeated prosecutorial misconduct, which the State Court of Appeal agrees occurred, deprived appellant of due process and a fair trial as guaranteed by the United States Constitution.

3. Whether the delay of appellant's trial to enable the prosecutor to join the juvenile defendants, in the face of appellant's repeated invocation of his speedy trial rights, deprived appellant of his federal constitutional right to a speedy trial.

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SEVEN

Petitioner/Appellant, Brandon Hein, hereby petitions for a writ of certiorari to the California Court of Appeal, Second Appellate District, Division Seven to review its decision affirming his conviction and sentence. The California Supreme Court denied appellant's petition for discretionary review.

OPINION BELOW

On January 29, 2001, in a partially published opinion, the California Court of Appeal, Second Appellate District, Division Seven, affirmed appellant's conviction and sentence. (Opinion is attached hereto as Appendix A, App. 1.) On March 8, 2001, appellant filed a Petition for Review in the California Supreme Court. On April 25, 2001, the California Supreme Court denied discretionary review and ordered the Court of Appeal's opinion depublished. (A copy of the court's order is attached hereto as Appendix B, App. 46.)

JURISDICTION

The California Court of Appeal, Second Appellate District, Division Seven, affirmed appellant's conviction and sentence in a partially published opinion on January 29, 2001. (Appendix A, App. 1.) Appellant's Petition for Review was denied and the Court of Appeal's opinion

ordered not published by the California Supreme Court on April 25, 2001. (Appendix B, App. 46.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, subdivision (a).

CONSTITUTIONAL PROVISIONS AND STATUTES

A. The Fifth Amendment of the United States Constitution

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . . nor be deprived of life, liberty, or property without due process of law . . . "

B. The Eighth Amendment to the United States Constitution

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."

C. The Sixth Amendment of the United States Constitution

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . . "

D. The Fourteenth Amendment to the United States Constitution

> " . . . Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

An information arising out of the May 22, 1995, death of James Farris was initially filed against appellant Brandon Hein and Jason Holland. (C.T. 250).[1] Appellant Hein and Holland announced ready for trial on August 21, 1995. (R.T. 21-23A). The prosecution sought a continuance to join Micah Holland and Anthony Miliotti, who were minors at the time of the offense, but whom the prosecution was seeking to have tried as adults. (R.T. 29A). The court allowed consolidation and the continuance was granted. (R.T. 32-35A, 44A). On September 6, 1995, following denial of a motion to dismiss, appellant Hein filed a petition for writ of prohibition in the Court of Appeal which was denied on September 14, 1995. (See, e.g., R.T. 218A, 502A, 1345A).

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[1] C.T. refers to the Clerk's Transcript, A.C.T. to the Augmented Clerk's Transcript.

R.T.S. refers to the Supplemental Reporter's Transcript. S.R.T. to Sealed Reporter's Transcripts. R.T. refers to the Reporter's Transcript. The pages in the pretrial volumes are sequentially numbered and designated as "AA" and "A" for example 1AA and 1A. The pagination starting with jury selection begins anew, for example 1.

An amended information filed on November 8, 1995, alleged in Count I that on May 22, 1995, appellant Brandon Wade Hein, and co-defendants, Jason Holland, Micah Holland and Tony Miliotti, entered a structure occupied by Michael McLoren with the intent to commit larceny in violation of California Penal Code section 459.[2] Counts II and III alleged respectively, that the four defendants attempted to rob Michael McLoren and James Farris III. Count IV alleged that the four defendants murdered Farris in violation of California Penal Code section 187, subdivision (a). It was further alleged that the murder was committed while engaged in the commission of a burglary and an attempted robbery within the meaning of Penal Code section 190.1, subdivision (a), subsection (17). Count V charged the four defendants with the willful, deliberate and premeditated attempted murder of McLoren in violation of Penal Code sections 664/187(A). (C.T. 255-61). With respect to all counts, it was alleged that each defendant personally used a knife within the meaning of Penal Code section 12022, subdivision (b) and that each defendant personally inflicted great bodily injury within the meaning of Penal Code section 12022.7, subdivision (a). (C.T. 255-61).

Appellant Hein was convicted on Count I of burglary and on Count II of the attempted robbery of McLoren. The allegations that appellant Hein personally used a knife and that he personally inflicted great bodily injury on McLoren and Farris, were found not to be true. The jury, however, found appellant Hein guilty in Count IV of

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[2] All further references to the Penal Code refer to the California Penal Code.

the first degree felony murder of Farris and further found that the murder occurred during the commission of a burglary and attempted robbery of McLoren within the meaning of Penal Code section 190.2, subdivision (a), subsection (17). In Count III, the jury found appellant Hein not guilty of the attempted robbery of James Farris and in Count V, not guilty of the attempted murder or any lesser included offense against McLoren. (C.T. 596-604).

Appellant Hein was sentenced to life in prison without the possibility of parole plus a consecutive term of four years for the burglary. (C.T. 1082). On August 21, 1996, he filed a timely notice of appeal. (C.T. 1307). On January 29, 2001, following extensive briefing by all parties and oral argument, the Court of Appeal issued its opinion affirming appellant's conviction and sentence. (See Opinion of the Court of Appeal attached hereto as Appendix A.) On April 25, 2001, the California Supreme Court denied appellant's request for review. (Appendix B.)

STATEMENT OF FACTS

The incident which gave rise to this case occurred in 1995 in a suburban community among a group of teenagers who knew each other to varying degrees. All of the boys, defendants and victims alike, had been drinking and/or smoking marijuana all afternoon. Michael McLoren and his close friend Jimmy Farris were stabbed with a 2½ inch pocket knife by Jason Holland during a fistfight with Jason and the other defendants, inside a

"fort" in McLoren's backyard where teenagers regularly gathered to smoke marijuana. Jimmy Farris died as a result of the stabbing. The prosecution's theory was that the defendants, at the instigation of Jason's younger brother, Micah Holland, entered the fort with the intent to take marijuana by means of fear or the threat of force. It was undisputed that the defendants were unarmed except for the pocket knife that no one else knew Jason was carrying. The Holland brothers, Brandon Hein and Tony Miliotti were found guilty of felony murder with special circumstances, burglary and the attempted robbery of McLoren. They were acquitted of the attempted robbery of Jimmy Farris. With the exception of Jason, they were also acquitted of assaulting McLoren, arming and use allegations, and the infliction of great bodily injury on Jimmy Farris. All but Micah, who, at age 15, was ineligible for an LWOP sentence, were sentenced to life without the possibility of parole. In as much as Jimmy Farris' tragic death is not representative of a homicide that would normally be prosecuted as a special circumstance felony murder, this case presents particularly interesting issues of law, with respect to the scope of California's statutory scheme, its interaction with the United States Constitution and the precedent of this Court.

For purposes of this petition, the Opinion of the Court of Appeal adequately sets forth the prosecution's case in chief and the defense case. (Appendix A.) However, the Court of Appeal failed to note that while McLoren testified that appellant Hein was hitting a non-responsive Farris in the face and head area, the prosecution's own expert testified that Farris' face was without

bruising and that, had he been struck as McLoren described, it would have left bruises. (R.T. 4309, 4345-46).

REASONS FOR GRANTING REVIEW

IN ORDER TO DETERMINE WHETHER PENAL CODE SECTION 190.2(D) IS UNCONSTITUTIONALLY VAGUE AND OVER BROAD UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS BOTH FACIALLY AND AS APPLIED TO APPELLANT IN THAT IT IS ARBITRARY, OVER INCLUSIVE, FAILS TO PROPERLY NARROW THE CLASS OF OFFENDERS ELIGIBLE FOR DEATH, IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE AND FAILS TO MEET SUBSTANTIVE DUE PROCESS REQUIREMENTS

This Court held in ***Enmund v. Florida***, 458 U.S. 782 [73 L.Ed.2d 1140; 102 S.Ct. 3368] (1982) that the death penalty is unconstitutional for one who does not himself kill, attempt to kill or intend that a killing take place. ***Enmund v. Florida, supra***, 458 U.S. 782 at 797. Five years later, in ***Tison v. Arizona***, 481 U.S. 137 [95 L.Ed.2d 127; 107 S.Ct. 1676] (1987) this Court refined the ***Enmund*** holding by maintaining that it is not cruel and unusual punishment to impose the death penalty upon a defendant who played a significant role in a felony that resulted in murder and who acted with reckless indifference to human life. ***Tison v. Arizona, supra***, 481 U.S. at 159.[3]

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[3] Although the prosecution did not seek the death penalty against Brandon Hein, the general principles of ***Tison*** apply as it

California Penal Code section 190.2, subdivision (d) which was enacted with all deliberate speed following this court's holding in ***Tison***, provides in pertinent part:

> ". . . . every person, not the actual killer, who with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests or assists in the commission of a felony enumerated in paragraph 17 of subdivision (1) which results in the death of some person or persons, and who is found guilty of murder the first degree therefore, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under section 190.4."

Penal Code section 190.2, subdivision (d) as presently drafted and applied is not in accord with ***Tison v. Arizona, supra,*** 481 U.S. 137. While some non-intentional murderers may be among the most dangerous and inhumane of all, ***id.*** at 481 U.S. at 157, Brandon Hein is not among them. While tragic to all concerned, within the

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was intended to apply to all cases wherein the prosecution sought additional punishment for a felony murder beyond that ordinarily contemplated by the applicable state law. In California, the ordinary punishment for first degree felony murder is twenty five years to life. It is only when certain additional facts are present that the punishment can be enhanced. [Thus] the evaluation of a felony murder special circumstance is the same regardless of whether the prosecution seeks death or life without the possibility of parole. ***People v. Estrada***, 11 Cal.4th 567, 575-576 (1995).

context of murder, Jimmy Farris' death is not a particularly aggravated crime and Brandon Hein is not a particularly culpable defendant. Brandon's conduct was not the moral equivalent of an intent to kill, nor does it fall with in the penumbra of non intentional conduct which is considered by this Court to be " . . . every bit as shocking." *Id.* at 481 U.S. at 157. He could not have foreseen that his conduct would lead to death since, as far as he knew, no one even had a weapon, let alone was likely to use one.

Thirty-eight states currently have capital murder statutes. Of these states, only twenty-three permit a capital murder conviction for felony murder. ***Source Book of Criminal Justice Statistics 1999***, Bureau of Criminal Justice Statistics, (2000). After an exhaustive review of the post-***Tison*** jurisprudence in these twenty-three states, appellant can find no cases where a defendant similarly situated to Brandon Hein has been rendered death eligible or subject to punishment above and beyond that normally meted out for felony murder. The following cases are illustrative of the way those states whose statutory schemes allow for the imposition of death or life without the possibility of parole are actually applying this Court's holding in ***Tison*** and serve to point out the need for this Court to offer further guidance to states like California.

In ***Reams v. Arkansas***, the Arkansas Supreme Court upheld a death penalty conviction for an accomplice defendant who assisted in an aggravated robbery. ***Reams v. Arkansas***, 322 Ark. 336, 339 [909 S.W. 2d 324; Ark. LEXIS 649] (1995). Here, the defendant and a co-conspirator waited at a local ATM for someone to drive up so they

could rob them. *Id.* The defendant stood by while the other suspect approached and shot the victim with a .32 caliber revolver. *Id.* The jury found two aggravating circumstances; (1) The defendant had committed the murder in order to realize pecuniary gain and (2) defendant had previously committed another felony, an element of which was the use of or threat of violence to another person or the creation of a substantial risk of death or serious physical injury to another person. *Id.* at 338. Defendant was sentenced to death and his conviction was subsequently affirmed by the Arkansas Supreme Court. *Id.* at 344. The instant case hardly involved an aggravated robbery. Even if technically a robbery, no one was carrying a gun and Brandon Hein did not even know that Jason had a pocket knife.

In *Montana v. Kills on Top*, the Montana Supreme Court originally upheld the death penalty conviction of an accomplice to a robbery, aggravated kidnaping and deliberate homicide. *Montana v. Kills on Top*, 243 Mont. 56, 65 [793 P. 2d 1273, Mont. LEXIS 161; 47 Mont. St. Rep. 984] (1990). In this case, the defendant was an accomplice to the robbery of a victim who was kidnaped from a local bar and then robbed, tortured and beat to death over a twelve hour period. *Id.* at 65-70. The court held that the death penalty was proper despite the fact that the defendant did not inflict the final fatal blows and was not present at the infliction of such blows. *Id.* at 104. The court further held that the fact that the defendant did not deliver the final blows did not preclude him from the death penalty. *Id.* The defendant was found to have met the major participant requirement set out in *Tison* and

therefore the court determined that the defendant had shown an extreme indifference to human life because;

> " . . . 1) the defendant participated in the restraint and beating of the victim, which included choking, 2) participated in the beating of the victim outside of the car which included kicking the victim in the head, 3) participated in forcing the victim to strip and get in the trunk, 4) did nothing to release the victim during the twelve hour ordeal in which the victim was visibly hurt, 5) directed that the car be moved into an alley when the victim was yelling for help, and 6) defendant helped dispose of the body." ***Montana v. Kills on Top***, 243 Mont. at 107; ***Tison v. Arizona***, 481 U.S. at 137.

These facts were originally held to be sufficient to meet the ***Tison*** standard and justify the imposition of the death penalty for an accomplice. ***Montana v. Kills on Top***, 243 Mont. at 107, 109.

However, the Montana Supreme Court reversed its own decision in ***Kills on Top v. Montana***, where the court held that the imposition of the death penalty on an accomplice defendant violated the Eighth Amendment. ***Kills on Top v. Montana, supra***, 279 Mont. at 413. The court held that in considering the defendant's prior sentence, it must also consider whether it is disproportionate to the harm petitioner caused and to the petitioner's involvement in the crime, as well as, whether the procedures under which the petitioner was sentenced satisfied the constitutional requirement of individualized consideration. ***Id.*** at 411. The court criticized the ***Tison*** rule by holding that it is incapable of carrying out any constitutionally meaningful delineation between classes

of felony murder accomplices, considering that every felony murder accomplice is arguably recklessly indifferent. *Id.* at 415; ***Tison v. Arizona, supra.*** The court held that it must distinguish between different kinds of felony murder accomplices through the examination of all of the factors in a given case. After all, "simply because a court can say that a defendant was recklessly indifferent does not mean that a death penalty is not grossly disproportionate under the Eighth Amendment." *Id.* The Montana Supreme Court, in reversing their decision, rejected a wholesale adoption of the Supreme Court's holding in ***Tison*** and instead maintained that reckless indifference is not by itself sufficient for the imposition of the death penalty. *Id.* at 423.

In her article, ***Overstepping Precedent?***, Lynn Wittenbrink similarly criticizes the requirement set out in ***Tison***, that only reckless indifference to human life is necessary to sustain the death penalty as crude. Wittenbrink, D. Lynn, ***Overstepping Precedent? Tison v. Arizona Imposes the Death Penalty on Felony Murder Accomplices***, 66 N.C.L. Rev. 817, 834 (1988). She argues that it is unclear what exactly is meant by this standard, and, as a result, wide latitude has been given to the states in this area. *Id.* She maintains that this language is likely to lead to disparate applications among states who apply the holding in ***Tison*** to broad categories of accomplice felony murder which do not meet the same fact pattern as in ***Tison***. *Id.* at 835; ***Tisoñ v. Arizona***, 481 U.S. at 137. The ***Tison*** standard has done away with the individualized consideration of culpability previously set forth by the Supreme Court in ***Enmund***, where this Court held that the death penalty is unconstitutional for one who did intend

to harm the victim. Wittenbrink, D. Lynn, at 835; citing, ***Enmund v. Florida***, 458 U.S. 728. In doing so, the ***Tison*** decision has allowed the death penalty to be inflicted upon individuals whose level of culpability is not equivalent to that of other death penalty recipients who have intentionally killed their victims. ***Id.***; ***Tison v. Arizona, supra***, 481 U.S. at 138. In maintaining that it is not cruel and unusual punishment to impose the death penalty upon a defendant who played a significant role in a felony that resulted in murder and who acted with reckless indifference to human life, ***Tison*** improperly collapses the element of a high level of participation in the underlying felony into the reckless indifference element. ***Id.*** at 836; citing, ***Tison v. Arizona, supra***, 481 U.S. at 137. Wittenbrink warns that if a jury or court is told that a high level of participation indicates reckless indifference, the two incorrectly become one. Wittenbrink, D. Lynn, at 835.

Similar concern has been echoed in Delaware. The Superior Court of Delaware has merged the individualized consideration espoused in ***Enmund*** with the apparent broadening of the death penalty eligibility in ***Tison*** and has interpreted what the ***Enmund-Tison*** decisions to hold that " . . . the death penalty is disproportional punishment for the crime of felony murder where the defendant was merely a minor participant in the crime and the state's evidence of mental state did not prove beyond reasonable doubt that the defendant actually killed, intended to kill or attempted to kill." ***Delaware v. Rodriguez***, 656 A.2d 262, 266; [Del. Super. LEXIS 493] (1993). The court succinctly stated that, "Mere participation in a robbery that resulted in murder is not enough

culpability to warrant the death penalty . . . " *Id.* Thus, the *Enmund-Tison* analysis must be applied on a case-by-case basis. *Id.* at 272. The court stressed that:

> "Major participation and reckless indifference to human life are more likely to be found where an accomplice defendant is present at and before a killing which involved considerable deliberation and the killing is preceded by physical or psychological abuse of the victim . . . [s]uch finding is less likely where the killing is sudden or impulsive and it cannot be established either through the testimony of the eyewitness or through other evidence that the defendant actually caused the victim's death."

Delaware v. Rodriguez, supra, at 272.

Appellant asks this Court to clarify that Delaware is correct in merging the *Enmund* and *Tison* standard so that, as this court intended, only those particularly deserving crimes and defendants are singled out by a state for increased punishment. Otherwise, as presently drafted and applied, California Penal Code section 190.2, subdivision (d) authorizes and encourages arbitrary and discriminatory enforcement (*City of Chicago v. Morales,* 527 U.S. 41 [119 S.Ct. 1849, 1859, 144 L.Ed.2d 67] (1999); *Loelender v. Lawson,* 461 U.S. 352, 357 [103 S.Ct. 1855, 75 L.Ed.2d 903] (1983)) and impermissibly delegates basic policy matters to the police, prosecutors, judges and juries for resolution on an ad hoc and subjective basis. *Grayned v. Rockford,* 408 U.S. 104, 108-109 [92 S.Ct. 2294; 33 L.Ed.2d 222] (1972); *People v. Superior Court (Caswell),* 46 Cal.3d 381, 389-00 (1988). This case does not involve the type of conduct contemplated by *Tison v. Arizona, supra,* 481 U.S. 137, so as to render a defendant,

who has neither killed nor intended that anyone be killed, death eligible. The application of Penal Code section 190.2, subdivision (d) to Brandon Hein is the result of a vague statute which improperly delegates legislative functions to the executive branch, to resolve on an ad hoc and subjective basis to whom the statute will be applied. The decision to prosecute the instant case as a special circumstance murder was an arbitrary and capricious decision which would not have been possible if the statute provided adequate guidelines.

Penal Code section 190.2, subdivision (d) is violative of the Fourteenth Amendment's equal protection clause, fails to appropriately narrow those offenders who are death eligible as required by the Eighth Amendment, and fails to meet substantive due process requirements.

The constitutional failings of the statute in issue are evidenced by the fact that a foolish teenage prank, which resulted in a totally unexpected tragedy, rendered an 18 year old boy, with no criminal record, death eligible. There is no rational basis for selecting either this offense or this offender for greater punishment than those numerous crimes which are more heinous and those numerous defendants who are more culpable than Brandon Hein.

IN ORDER TO DETERMINE WHETHER PROSECUTORIAL MISCONDUCT, WHICH THE STATE COURT OF APPEAL AGREES OCCURRED, DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR TRIAL AS GUARANTEED BY THE FEDERAL CONSTITUTION

The prosecution in the instant case engaged in repeated instances of flagrant misconduct. The prosecution disobeyed a court order refraining it from implying that the defendants were members of a gang, indulged in name-calling, deliberate distortions of fact, histrionics and generally made an appeal to raw emotions rather than facts to convince the jury that the defendants should be convicted. Among his misdeeds were to call appellant Hein's trial attorney, Jill Lansing, a liar; he referred to this case as a gang case when, in fact, the court had specifically ruled that gang evidence was inadmissible; he used the evidence of other crimes, notably the Moulder incident, as character evidence to show that appellant Hein had a propensity to commit crimes; he accused the defense attorneys of lying to the jury, and urged the jury to see themselves as though they were victims of the defendants. Although the Court of Appeal found that there was pervasive prosecutorial misconduct (Appendix A, App. 14), it declined to find the misconduct prejudicial in the face of what it describes as overwhelming evidence of guilt and an unpersuasive defense case. The Court of Appeal's decision is not only unsupported by the record but is also contrary to this Court's firmly established law. The prosecutor's repeated instances of misconduct cumulatively infected appellant's entire trial thereby

depriving appellant of his Fifth Amendment due process rights and his Sixth Amendment right to a fair trial.

Furthermore, contrary to the Court of Appeal's decision, the evidence on the contested mental state issues was far from overwhelming. Although evidence that appellant Hein was present when Jason stabbed Farris and that the incident involved the obtaining of marijuana from McLoren was uncontested, evidence of intent to steal was weak, as evidenced by the jury's lengthy deliberation on this subject, and evidence of the necessary mental state to sustain the special circumstance finding of reckless indifference was non existent. According to juror number 10, her belief that intent to steal, which was the key to the case, had not been proven, caused two additional days of deliberation. (C.T. 1036, R.T. 6857). Absent the prosecutorial misconduct, other jurors may have agreed with juror number 10 that intent to steal had not been proven and acquitted appellant Hein of felony murder or at the least, found the special circumstance allegation not to be true. ***Chapman v. California,*** 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] (1967). Therefore, contrary to the Court of Appeal's opinion, reversal of appellant's conviction is warranted.

This Court has recognized that prosecutorial misconduct may "so infect the trial with unfairness as to make the resulting conviction a denial of due process." ***Donnelly v. DeChristoforo,*** 416 U.S. 637, 643 [94 S.Ct. 637, 40 L.Ed.2d 431] (1974). To constitute a due process violation, the prosecutorial misconduct must be " 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' " ***United States v. Bagley,*** 473 U.S. 667, 676 [105 S.Ct. 3375, 3380, 87 L.Ed.2d 481] (1985), quoting

United States v. Agurs, 427 U.S. 97, 108 [96 S.Ct. 2392, 2399, 49 L.Ed.2d 342] (1976); *Darden v. Wainwright*, 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144] (1986). The prosecution's improper comments combined to completely deprive appellant of his Fifth Amendment due process rights and Sixth Amendment right to a fair trial. This case includes such egregious misconduct that it is exactly the situation contemplated by this Court in *Donnelly*.

In the instant case, the California Court of Appeal recognized that the prosecution committed several instances of misconduct. (Appendix A, App. 14-17.) However, the Court of Appeal inexplicably found that the conduct of the prosecutors neither individually nor cumulatively required reversal of appellant's conviction. (Appendix A, App. 17.) This conclusion is contrary to the evidence. It is undisputed that the prosecutor asked Jason, during his testimony, whether he was a member of the Gumbys, directly contravening the trial court's order excluding gang evidence. It is also undisputed that the prosecutor engaged in personal attacks on opposing counsel, argued his personal opinions as to the purity of the prosecution case versus the dishonesty of the defense case, suggested the existence of gang activity and stated his opinions regarding the bad character of appellant and his co-defendants. (Appendix A, App. 14-17.) The Court of Appeal even conceded that all of the above-mentioned instances amounted to misconduct. However, the court found that the error was not reversible because "it is not reasonably probable that a result more favorable to appellant would have occurred." (Appendix A, App. 17.) Thus, finding the prosecution's case overwhelming and the

defense case unpersuasive, the court concluded that the misconduct was not so egregious as to infect the trial with such unfairness as to make the conviction a denial of due process. This conclusion is erroneous. The prosecution's conduct in the instant case was exactly the type referred to by this Court in ***Donnelly***. Absent the prosecution's inappropriate remarks infecting the trial, it cannot be said, beyond a reasonable doubt, that appellant would have been convicted of felony murder or the underlying offense of attempted robbery or burglary. ***Chapman v. California, supra***, 386 U.S. 18. Evidence of intent to steal was weak and evidence of the necessary mental state to sustain the special circumstance finding of reckless indifference was non-existent. The flawed reasoning of the Court of Appeal is apparent from the fact that despite terming the evidence of guilt overwhelming, the court went on to reverse the special circumstance finding against Tony Miliotti, finding the evidence insufficient as a matter of law. The misconduct Mr. Latin engaged in, which included calling appellant's trial counsel a liar, (R.T. 6199, 6263) should not be countenanced by this Court. Mr. Latin secured his conviction by reprehensible means. Unless he, and other prosecutors, are made to realize that such actions will result in the reversal of the convictions thus obtained, there will be no incentive for prosecutors to conduct themselves in accordance with the appropriate norms of professional conduct.

IN ORDER TO DETERMINE WHETHER THE DELAY OF APPELLANT'S TRIAL IN THE FACE OF HIS ASSERTION OF HIS SPEEDY TRIAL RIGHTS, SO THAT THE PROSECUTOR COULD JOIN JUVENILE DEFENDANTS DEPRIVED APPELLANT OF HIS FEDERAL CONSTITUTIONAL RIGHTS TO SPEEDY TRIAL

A. Introduction

On June 7, 1995, Brandon Hein was held to answer to a criminal complaint charging him and Jason Holland with acts leading to the May 22, 1995, death of Jimmy Farris and stabbing of Michael McLoren. (C.T. 109-111.) On June 21, 1995, counsel stipulated that the complaint was deemed the Information against appellant Hein with the exception of striking any reference to co-defendant Jason Holland who had not yet been held to answer. Trial was set for August 14, 1995 with a last day of August 21, 1995. (C.T. 606.) On July 20, 1995, the court heard argument on a hypothetical joinder motion pursuant to the prosecution's desire to join Jason Holland, who had not yet been held to answer. (C.T. 658.) Defense counsel for appellant Hein objected to joinder if the trial were to go beyond the last day of August 21, 1995. (C.T. 658). Appellant Hein's counsel also argued that she would object to joinder of the juveniles, Micah Holland, Anthony Miliotti and Christopher Velardo, if trial were to begin beyond August 21, 1995. (R.T. 22AA, 24AA.)

Jason Holland was held to answer on July 27, 1995. (C.T. 152.) On August 14, 1995, defense counsel for appellant Jason Holland and appellant Hein indicated that they would be ready for trial by appellant Hein's last day, August 21, 1995. (R.T. 20-21AA; R.T. 4A, 21-23A.) After in

camera hearings on August 14, 1995 and August 15, 1995, the court ruled that the prosecution would be required to disclose confidential information regarding interviews with co-defendants Velardo and Miliotti obtained pursuant to a use immunity agreement. (S.R.T. August 14, 1995; S.R.T. August 15, 1995; R.T. 47AA; 1A.) The court gave the prosecution until August 18, 1995, to make a decision whether to disclose or suffer a dismissal. (R.T. 47-49AA.) Micah Holland, Miliotti and Velardo were held to answer on August 17, 1995. (C.T. 233-34.)

On August 18, 1995, faced with either turning over evidence or suffering dismissal, the prosecutor, as the court and he had already decided in camera, (S.R.T. August 15, 1995 R.T. 24-37), sought to consolidate Hein and Jason Holland with the three juveniles and continue the case. (R.T. 24A, 26A, 32-35A.) At this time, the prosecution also indicated that it would not disclose the interviews with Velardo and appellant Miliotti. (R.T. 19A.) Appellant Hein's counsel, unaware of what was taking place in camera, argued that the prosecution was seeking to consolidate because defendants who are jointly charged must wait until everyone is ready to begin trial. (R.T. 25A.) Counsel added that they were not already jointly charged and thus, the prosecution had to show good cause to continue his case. (R.T. 26A, 34A.) The court granted the prosecution's motion to consolidate and to continue the trial. (R.T. 29A, 31A, 35A.) The court set the trial for October 6, 1995 with the last day being October 17, 1995. (R.T. 37A, 40A.) Appellant Hein's motion to dismiss filed on August 22, 1995, was denied. (R.T. 44A, 49A; C.T. 1088.) On September 6, 1995, appellant Hein filed a Petition for Writ of Prohibition/Mandate

in the Court of Appeal arguing that his Sixth Amendment right to a speedy trial was violated when the court continued his case past the statutory limit of 60 days and denied his motion to dismiss. Appellant Hein's writ was denied on September 14, 1995.

On September 28, 1995, the attorneys for appellant Micah Holland and Jason Holland moved for a continuance. (C.T. 1158, 1223; R.T. 171A, 213A.) Appellant Hein opposed the motion and objected to the admission of any evidence that was obtained after August 21, 1995. (R.T. 172A, 218A.) The court granted the continuance and set trial for January 8, 1996. (C.T. 1223; R.T. 221-22A, 231A.) On December 4, 1995, defense counsel for Jason Holland and Micah Holland requested another continuance. (R.T. 500-01A; C.T. 275.) Appellant Hein objected to the continuance, reminding the court that he had been ready since August 21, 1995. (R.T. 502A.) The court granted the motion to continue and trial was set for February 13, 1995. (C.T. 275; R.T. 505A.) On February 5, 1996, prior to commencing trial, appellant Hein objected to the use of any testimony or evidence that was not available as of August 21, 1995, appellant Hein's sixtieth day. (R.T. 1354A.) The court denied appellant's motion to exclude. (R.T. 1354A.) On February 13, 1996, defense counsel for appellant Jason Holland was unable to proceed with trial due to an obligation in another court. (C.T. 304.) Appellant Hein once again objected to any continuance. (C.T. 304.) The court granted the continuance motion and set trial for February 27, 1996. (C.T. 304.)

B. Brandon Hein Was Denied His Right To A Speedy Trial

The right to a speedy trial is a fundamental right secured by the Sixth Amendment to the United States Constitution and is made applicable to the states by the Fourteenth Amendment. ***Klopfer v. North Carolina,*** 386 U.S. 213 [87 S.Ct. 988, 18 L.Ed.2d 1] (1966). Whether a defendant's Sixth Amendment right to a speedy trial has been deprived is determined on an ad hoc basis. ***Barker v. Wingo,*** 407 U.S. 514, 530 [92 S.Ct. 2182, 2191, 33 L.Ed.2d 101] (1972). The length of the delay is to some extent a triggering mechanism. In other words, "until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." ***Id.*** at 530-31. When a delay in bringing a defendant to trial after the filing of formal charges has become presumptively prejudicial, and the defendant seeks dismissal of the charges on grounds that his Sixth Amendment right to a speedy trial has been violated, the court must balance the relevant factors – the length of the delay, the reason for the delay, the defendant's assertion of the right, and the prejudice to the defendant – in assessing whether the delay has deprived the defendant of that right. ***Id.*** at 530. "But because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the constitution." ***Id.*** at 533. The question to be asked is, "In the face of petitioner's

repeated demands, did the State discharge its 'constitutional duty to make a diligent, good-faith effort to bring him to trial?' " ***Smith v. Hooey***, 393 U.S. 374, 383 [89 S.Ct. 575, 21 L.Ed.2d 607] (1969). Furthermore, the defendant need not establish actual prejudice as a prerequisite to a hearing at which evidence relevant to this balancing process is heard. ***Moore v. Arizona***, 414 U.S. 25, 26 [94 S.Ct. 188, 189, 38 L.Ed.2d 183] (1973).

A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. ***Barker v. Wingo, supra***, 407 U.S. at 531. This Court has indicated on previous occasions that it is improper for the prosecution intentionally to delay "to gain some tactical advantage over (defendants) or to harass them." ***United States v. Marion***, 404 U.S. 307, 325 [92 S.Ct. 455, 466, 30 L.Ed.2d 468] (1971); See, ***Pollard v. United States***, 352 U.S. 354, 361 [77 S.Ct. 481, 485-86, 1 L.Ed.2d 393] (1957). Bad faith delay, which includes holding back the prosecution to gain some impermissible advantage, makes relief virtually automatic. ***Doggett v. U.S.***, 505 U.S. 647, 656-57 [112 S.Ct. 2686, 120 L.Ed.2d 520] (1992). In the instant case, the prosecution's reason for seeking a delay in the trial was improper and used to gain a tactical advantage over him and ensure a conviction. Pursuant to the Sixth Amendment and this Court's firmly established precedent, reversal of his conviction is required.

The in camera hearings all point to the conclusion that Brandon Hein's rights to a speedy trial were violated because the prosecutor considered it of vital importance that Micah Holland be tried with Jason and Brandon. (S.R.T. August 15, 1995, p. 5; S.R.T. August 14, 1995). The

prosecutor stated, on the record, "Of course, I have indicated that joinder is of critical importance to the prosecution in this case." (S.R.T. August 14, 1995, p. 25.) None of these conversations were, of course, available to Ms. Lansing at the time she prepared her petition for writ of prohibition. However, the joinder the prosecutor desired to ensure a conviction of Brandon Hein, was not good cause to deprive appellant Hein of his constitutional right to a speedy trial. This was not a situation where a co-defendant's need to prepare was considered good cause for a continuance in a case in which the defendants are jointly charged. In this case, Hein was charged alone, there were no jointly charged defendants. Furthermore, the record reveals that the continuance was done, with the blessing of the court, to delay disclosure of evidence to the defense, and then as a tactical matter decided not to obey the court's order to disclose. (See S.R.T., August 15, 1999, pages R.T. 24-37). He either delayed disclosure in order to obtain joinder or requested joinder in order to obtain a continuance. Appellant submits that the former is the more likely, but either is unacceptable and in bad faith. The preference for joinder, relied on by the Court of Appeal, is for purposes of judicial economy, not to make it easier, as here, for the prosecution to obtain a conviction or to get a continuance in order to avoid complying with court ordered discovery. The Court of Appeal's decision to the contrary is erroneous and it contravenes the Sixth Amendment of the United States Constitution.

Although appellant Hein believes that the prosecution's bad faith in seeking a continuance requires reversal per se, he can show actual prejudice resulting from the repeated continuances. The delay gave the prosecution

time to gather evidence of gang affiliations and bad character particularly with respect to Micah Holland. Ms. Lansing argued in her motion for new trial, that the joinder of Micah Holland and the bad character evidence the prosecutor gathered on him, made it impossible for appellant Hein to attack and explore the character of the victims. (C.T. 923.) It is also apparent, as Ms. Lansing pointed out just before trial, that when appellant Hein announced ready for trial, the prosecution had not developed any gang evidence. (R.T. 1345A, 1305A, 1308A.) The prosecution was able, during the continuance to obtain evidence allegedly connecting some of the defendants to a gang called the Gumbys or the Gremlins. Evidence was introduced that "Gumbys" and "Gremlins" are "gangs" which are active in the Agoura/Thousand Oaks area. (R.T. 4459-61.) The prosecution was permitted, over defense counsel's objection, to introduce evidence that while the defendants were inside of McLoren's fort, Micah Holland stated, "You want to start shit with the Gumbys, ESE?" McLoren testified that "Gumbys" was a local gang and that "ese" is a Mexican slang word often used before a fight ensues. (R.T. 3591-92.) This evidence permitted the jury to infer that appellant Hein was a gang member or associated with gang members, despite the fact that such inference was unsupported by the evidence. The statement of Micah would probably have been excluded as inadmissible hearsay, at a separate trial, and even if it had been admitted, it would not have had the same impact.

Perhaps most importantly, without the joinder of defendants Micah Holland and Anthony Miliotti, Hein would not have been subjected to repeated references and

not so veiled innuendoes about gang affiliations which permeated the joint trial. The prosecution would not have been able to effectively engage in the misconduct noted in the argument above. "A pack of wolves looking for a bunny" would not have had the same impact without a group of teenagers at which to direct the remark. Although strictly forbidden to do so by the court, the prosecution succeeded in making the jury believe that the defendants were members of a dangerous gang. Thus, absent the deprivation of appellant's Sixth Amendment right to a speedy trial, appellant would not have been convicted of felony murder or the underlying offenses.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that this Court grant certiorari and reverse the California Court of Appeal, Second Appellate District, Division Seven.

Respectfully submitted,

MARILEE MARSHALL
Attorney for Petitioner Brandon Hein

APPENDIX A

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, *v.* BRANDON HEIN, et al., Defendants and Appellants.	B106689 (Los Angeles County Super. Ct. No. SA022108) (Filed Jan. 29, 2001)

APPEAL from the judgment of the Superior Court of Los Angeles County. Lawrence J. Mira, Judge. Affirmed in part; modified in part; and remanded with directions.

Robert Derham, under appointment by the Court of Appeal, for Defendant and Appellant Micah Holland.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant Anthony Miliotti.

Aron Laub, Woodland Hills, for Defendant and Appellant Jason Skip Holland.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication beginning with the first page of the opinion and up to and including the sentence reading "Subsequently, he voluntarily surrendered to law enforcement authorities" and parts XIV, XV and XVI.

Marilee Marshall & Associates and Marille [sic] Marshall, Pasadena, for Defendant and Appellant Brandon Wade Hein.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, March Sanchez, Supervising Deputy Attorney General, and Victoria Bedrossian, Deputy Attorney General, for Plaintiff and Respondent.

This is an appeal from convictions (by jury) of various offenses, as follows:

1. *Appellants Brandon Wade Hein, Micah Holland, Jason Holland and Anthony Miliotti:* Count I, burglary (Pen.Code, § 459). Count II, attempted robbery (Pen.Code, §§ 664/211, 1192.7, subd. (c)(19)). Count IV, murder committed during the course of a burglary and an attempted robbery (Pen.Code, §§ 187, subd. (a), 190.2, subd. (a)(17), 1192.7, subd. (c)(1)). The jury found to be true allegations of special circumstances and found the murder, burglary and attempted robbery to be of the first degree.

2. *Appellant Jason Holland (only):* In addition, the jury found this appellant, guilty of the lesser crime of assault with a deadly weapon as to count V, attempted willful, deliberate, premeditated murder. (Pen.Code, §§ 664/187, subd. (a), 1192.7 subd. (c).) The jury also found to be true the personal use allegations as to counts I, II and IV (Pen.Code, §§ 12022, subd. (b)) and the great bodily injury allegations as to counts I, II and V

(Pen.Code, §§ 12022.7, subd. (a), 1192.7 subd. (c)(8)). (The jury found the allegations of personal use and great bodily injury to be not true as to the remaining appellants.)

Appellants were sentenced to state prison, as follows:

1. Jason Holland – Life without possibility of parole plus eight years.

2. Brandon Hein – Life without possibility of parole plus four years.

3. Anthony Miliotti – Life without possibility of parole plus four years.

4. Micah Holland – 29 years to life.

SUMMARY OF FACTS AND PROCEEDINGS

Michael McLoren (McLoren) maintained a structure referred to as "the fort" in the backyard of his residence. The fort was a 13′ x 14′ enclosed structure furnished with, among other accoutrements, a bed and desk. The desk had two drawers containing marijuana and money. The top drawer contained marijuana for personal use. The second drawer, which was customarily locked, contained money and marijuana for sale. McLoren kept the key to the lock. The fort was generally known as a place where young persons could obtain and smoke marijuana. The existence of the marijuana and cash and their location were not secrets.

All facts relevant to the charged offenses occurred on May 22, 1995.

Jimmy Farris (Farris) and McLoren were friends. Although acquainted with appellants, Farris and McLoren were not friends with appellants. During the afternoon and evening, appellants were constantly in the company of each other, visiting friends, "cruising" the neighborhood and engaging in the conduct more specifically discussed below. Appellants were traveling about in a red pickup truck owned and driven by Christopher Velardo (Velardo).

In less than an hour before the charged offenses, at a location close to McLoren's residence, appellant Jason Holland (Jason) stole the wallet of Alyce Moulder (Moulder) from the Moulder vehicle. All of the other appellants were present in the pickup truck driven by Velardo. A short time later, Moulder spotted the Velardo truck and confronted Velardo and appellants. Velardo, the Holland brothers, and Brandon Hein (Hein) verbally accosted and threatened Moulder, struck the Moulder vehicle with objects and spat on the Moulder vehicle. (Hereinafter referred to as the "Moulder incident".) Although present throughout the Moulder incident, there is no evidence that appellant Anthony Miliotti (Miliotti) participated in it.

At approximately 7:00 p.m. McLoren and Farris were in the McLoren backyard in the immediate vicinity of the fort. Without permission or invitation, all appellants as a group entered the McLoren backyard by hopping over a fence. Micah Holland (Micah) and Miliotti entered first. Jason and Hein followed approximately ten to fifteen feet behind Micah and Miliotti. Micah immediately entered the fort and Miliotti stood in the doorway. Appellants did not have permission or invitation to enter the fort. There

had not been prior arrangement for the sale of marijuana between McLoren and appellants.

Appellant Jason was carrying a folding pocketknife. There is no evidence that appellants Micah, Hein, or Miliotti carried weapons or that any of them knew Jason carried a pocketknife.

Appellant Micah unsuccessfully attempted to pull open the locked desk drawer. Next, appellants Micah and Hein, in a threatening manner, shouted words demanding that McLoren turn over the key to the locked desk drawer. Appellant Micah, when threatening McLoren and demanding the key, shouted, "Give me the key fool" and "Give me the key, ese. You want shit with Gumbys, ese?" McLoren refused to relinquish the key.

Appellants Micah, Jason and Hein then verbally and physically assaulted McLoren. The intensity and violence of the battle escalated. McLoren held Micah face down on a bed and elbowed him about the back and neck. Jason attempted to pull McLoren off of Micah. McLoren kicked Jason in the face. McLoren then heard appellant Jason say, "Let's get this fucker." While being held in a head-lock, McLoren twice felt sharp, debilitating, pulsating sensations, which later proved to be multiple stab wounds. Jason admitted stabbing McLoren.

After McLoren was stabbed, Farris entered the fort and became involved in the melee. Farris confronted Jason, who turned and, without hesitation, stabbed Farris twice in the torso. Immediately thereafter, McLoren observed Hein beating Farris in the head and face with his fists. Farris did not resist or otherwise defend himself from the blows administered by Hein.

Both McLoren and Farris broke away from the fight and ran to McLoren's house. They each reported to McLoren's mother that " . . . they (appellants) came to get our stuff . . . " and had stabbed them. Mrs. McLoren saw a stab wound in the center of Farris' chest.

Witnesses observed appellants together leaving the McLoren yard, being met by the Velardo pickup truck and driving away in Velardo's pickup truck. A witness testified that he observed the four appellants on the street as they left the McLoren backyard apparently talking among themselves and smiling.

The evidence of Miliotti's involvement at or inside the fort consists of the testimony of McLoren, Jason and exhibits entered in connection therewith.

Jason testified that from the outset of the confrontation and fight Miliotti, who was physically the largest of the three appellants, stood in the doorway of the fort and that he (Jason) did not see Miliotti inside the fort. Jason testified that the only three people involved in the fight were McLoren, Micah and himself. Jason also testified that he was the one who pulled McLoren from Micah and that he (Jason) was the one who held McLoren during the stabbing. In depth cross-examination by the district attorney did not place Miliotti inside the fort.

McLoren's testimony regarding Miliotti's involvement is equivocal and contradictory. McLoren testified that all four appellants entered his backyard and positioned themselves around him in a manner making him feel surrounded. McLoren testified that Miliotti only stood in the doorway of the fort during the fight (a few feet away) and that he (McLoren) did not know if Miliotti

ever entered the fort; that Miliotti did enter the fort and participated in the fight; that he (McLoren) thought Miliotti held him in a headlock when Jason stabbed him, but did not actually see Miliotti; that he (McLoren) did not know who imposed the headlock.

During initial police interviews, McLoren stated that Velardo was one of the four persons involved. Miliotti was not mentioned. Several days later, McLoren changed his statement and identified Miliotti as a participant, excluding Velardo.

The testimony of appellant Jason contradicted many of the details of the Moulder incident, as recited above. Jason testified that he, while travelling to McLoren's house and upon entering the McLoren property, at all times "believed" appellants went to the McLoren fort for the purpose of purchasing marijuana. Jason testified that, although he knew McLoren sold marijuana from the fort, he (Jason) had never himself purchased marijuana from McLoren. Jason testified that a fight quickly ensued between Micah and the much larger McLoren.

Jason testified that he feared for his brother's (Micah) safety and that in coming to the aid of Micah, he (Jason) was kicked in the face. Jason admitted in open court that in the course of the fight he did in fact stab both McLoren and Farris. Jason told the other appellants and Velardo that he (Jason) had stabbed both McLoren and Farris and showed them his knife with blood on it. Up to this point, the evidence is that only appellant Jason knew that McLoren and Farris had been stabbed.

Jason testified that he was under the influence of alcohol during both the Moulder incident and the events at the fort.

McLoren was hospitalized for stab wounds, which were constantly and intensely painful. Jimmy Farris died. The cause of Farris' death was the stab wound(s) inflicted during the fight with appellants.

In a telephone conversation, Jason's mother told him that he was wanted for murder. Jason fled and went into hiding for several weeks. Subsequently, he voluntarily surrendered to law enforcement authorities.

Following extensive in limine proceedings, the trial court found that there was insufficient evidence to implicate appellants as gang members and ruled as a matter of law that any evidence of gang membership would be excluded. Notwithstanding this ruling, during cross-examination, Deputy District Attorney Semow inquired of appellant Jason:

"Q: Do you know what Gumbys is?

"Mr. Leftwich: Your Honor, objection.

"Mr. Salzman: Objection. Would you kindly admonish the District Attorney to listen to the Court's ruling.

"The Court: Sustained.

"By Mr. Semow: Q:Are you a member Of Gumby's?

"Mr. Salzman: Objection.

"Mr. Leftwich: Oh, my God.

"Ms. Lansing: Objection.

" . . .

"The Court: Sustained, Mr. Semow."

(The court had allowed expert law enforcement testimony which identified "Gumbys" as a local street gang.)

The trial court received in limine argument regarding the admissibility of evidence relating to uncharged criminal offenses. Ultimately, the trial court admitted evidence of the Moulder incident for the limited purpose of proving identity and intent. The trial court further found that the probative value of such evidence outweighed any prejudicial effect.

At the time such evidence was admitted and again at the conclusion of trial, the court instructed the jury that evidence of uncharged offenses (Moulder incident) could be considered only for the limited purpose of determining if it tended to show the existence of the intent required for the charged offense(s) and the identity of the person(s) who committed the charged offense(s).

In the opening phase of final argument, Deputy District Attorney Semow properly addressed the evidence received and limited his comments regarding the Moulder incident to the issues of identity and intent.

Not so, however, did Deputy District Attorney Michael Latin (Latin) in the rebuttal phase of final argument:

"What was Jason's explanation for why they took the Wallet? . . . It wasn't just stupid, it was evil. It was mean-spirited, it was dishonest, and it was rotten, and he didn't feel any remorse for doing that. If he did, there were a number of things he could have done. And neither did

Brandon Hein and neither did Micah Holland, and neither did Tony Miliotti. . . . What does that tell you about these five individuals? They're not very nice, are they?

"Mr. Salzman: Objection.

"Mr. Sussman: Objection

"The Court: Sustained.

"Mr. Salzman: Ask the jury be admonished to disregard that.

"The Court: I think the jury is well aware this isn't evidence."

During final argument, Latin also impugned the honesty and integrity of defense counsel; expressed his opinion as to the "purity" of the prosecution case compared to the contaminated defense; compared appellants to a pack of wolves attacking a bunny rabbit; and, strongly suggested that this case involved gang activity.

LAW AND DISCUSSION

Appellants Jason, Hein and Miliotti have each, pursuant to California Rules of Court, rule 13, joined in all beneficial arguments of their co-appellants. Although the opening brief of appellant Micah does not join, since most issues are common to all appellants, it shall be assumed that Micah intended to exercise his rule 13 joinder. Except as otherwise specifically indicated references to "appellants" herein shall refer to all appellants.

Throughout the following discussion, references are made to the court's admonitions and instructions to the

jury. Unless otherwise indicated, "It is, of course, axiomatic that the jury is presumed to have followed the instructions and obeyed the law. (Citation)" (*People v. Ryan* (1981) 116 Cal.App.3d 168, 179.) Furthermore, "It is well settled that in determining the sufficiency of jury instructions, we must consider the entire charge of the court Additionally, we must assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. (Citations)" (*People v. Mills* (1991) 1 Cal.App.4th 898, 918)

Appellants were convicted, inter alia, either as perpetrators or aiders and abettors of murder committed during a burglary or attempted robbery, i.e., felony murder.

The pivotal issues for determination by the trier of fact (the jury) were: 1) Did appellants, as they entered the McLoren property and engage in the activities discussed herein, have the requisite specific intent to permanently deprive the victim of his property? 2) Were appellants aiders and abettors in the commission of the underlying crimes, i.e., burglary and attempted robbery? 3) Was the stabbing of Farris part of one continuous course of criminal conduct; or, was it separate and distinct from the underlying crimes of burglary and attempted robbery?

I. Inconsistent Verdicts

Appellants have frequently interpreted apparent inconsistencies in the various verdicts in support of their contentions. In analyzing this case, we do not consider the inconsistent verdict arguments. (*People v. Santamaria*

(1994) 8 Cal.4th 903, 911; *People v. York* (1992) 11 Cal.App.4th 1506, 1510; Pen. Code, § 954.)

II. Evidence of Uncharged Offense(s) (Moulder Incident)

At the outset of trial, both identity and intent were open issues. As the trial proceeded, the identity issue became moot. Appellant Jason admitted stabbing both McLoren and Farris. The uncontradicted evidence was that all appellants were present throughout the Moulder incident and the events at the fort.

The issue of appellants' intent in entering the McLoren property and during the events at the fort was hotly contested and critical throughout the trial.

The Moulder incident and the underlying charged crimes are theft-type offenses involving group action and intimidating conduct by members of the group. In both the Moulder incident and the underlying charged offenses, the acting group consisted of all appellants. Finally, it occurred at a time and location relevant to the underlying charged offenses.

The trial court admitted evidence of the Moulder incident as proof of intent and identity, but not for common design or plan.

Evidence relating to appellants' intent is clearly material. The nature of the misconduct in the Moulder incident is similar to that of the charged crimes. " '[I]f a person acts similarly in similar situations, he probably harbors the same intent in each instance' (citations)

and . . . such prior conduct may be relevant circumstantial evidence of the actor's most recent intent." (*People v. Robbins* (1988) 45 Cal.3d 867, 879.) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. (Citation.)" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402; *People v. Hawkins* (1995) 10 Cal.4th 920, 950-952; *People v. Robbins, supra,* 45 Cal.3d at p. 880.)

The trial court properly weighed the probative value of such evidence against its prejudicial effect. (Evid. Code, § 352.) The court thoroughly stated on the record its reasoning in concluding that evidence of the Moulder incident would be admissible for the stated purposes. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 406.) There is no error in the trial court's reasoning or decision on this issue.

During trial, when the evidence was received and on other occasions the jury was instructed that evidence of the Moulder incident could be considered only in determining the issues of intent and identity and not for any other purpose. (Evid. Code, § 1101(b).) At the conclusion of trial, the trial court formally instructed the jury generally regarding evidence received for a limited purpose (CALJIC No. 2.09); and, specifically, regarding the limited use for which evidence of uncharged crimes was received, to wit: intent and identity. The jury was specifically instructed that such evidence could not be considered to show bad character or a disposition to commit crimes or for any purpose other than that allowed by the court. (CALJIC No. 2.50)

The trial court did not abuse its discretion in admitting evidence of the Moulder incident. (*People v. Memro* (1995) 11 Cal.4th 786, 864.)

III. Prosecutorial Misconduct

Appellants contend that the Gumbys membership question asked of Jason by Deputy District Attorney Semow (Semow) and the closing argument by Deputy District Attorney Latin (Latin) are each in themselves prejudicial misconduct and constitute cumulative misconduct which deprived appellants of their rights to a fair trial.

We agree with appellants that the Gumbys membership question asked by Semow directly contravened the trial court order excluding gang evidence. It was wrong of Semow to ask this question. At the very least, Semow should have raised the issue at side bar outside the presence of the jury. However, the trial court sustained timely objections by defense counsel. The court instructed the jury: "I want to give you an instruction that makes reference to a single question that was asked here with reference to membership in Gumbys. Semow asked the question. I believe the question was an improper question to ask.

"I want you to understand here that there is nothing in the evidence that has been presented in the trial which would establish that any of these defendants are members of this gang called Gumbys. The question that was asked, as you will be instructed, is not evidence, so the question doesn't give you that information.

"And if you thought you heard a response . . . disregard it.

"It is critically important that you decide this case on the facts and the reasonable inferences from it and not from anything else. All right?"

At the conclusion of the case, the jury was instructed not to assume to be true any insinuation suggested by a question; and, that a question is not evidence and may be considered only as it enables the jury to understand the answer. (CALJIC No. 1.02)

In his rebuttal argument, Latin engaged in personal attacks on opposing counsel, argued his personal opinions as to the "purity" of the prosecution case versus the dishonesty of the defense case, suggested the existence of gang activity and stated his opinions regarding the bad character of appellants. Such conduct was unnecessary; professionally questionable and highly risky. It was misconduct.

"A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

While it is reasonable to argue that many comments in the rebuttal by Latin fall below the standard of professional responsibility expected of prosecutors, they also fall far short of the constant and egregious misconduct present in *People v. Hill, supra*, 17 Cal.4th 800.

" ' "[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it

amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' [citation], and he may 'use appropriate epithets. . . . ' " ' (*People v. Wharton* [(1991)] 53 Cal.3d [522,] 567-568 [280 Cal. Rptr. 631, 809 P.2d 1279].)" (*People v. Hill, supra,* 17 Cal.4th at p. 819.)

This was a long, intense, hard fought trial. There were weeks of pretrial proceedings. Opening statements to the jury began on March 26, 1996. Verdicts were returned on May 28, 1996. The wrongful Gumbys membership question by Semow and the wrongful rebuttal argument by Latin could not, in themselves, have consumed more than a few minutes. The ensuing argument and admonition/instruction by the court undoubtedly took more time than the combined question and rebuttal. The prosecutorial conduct in question here pales when compared to the daily, constant, unrelenting misconduct of the prosecutor in *Hill*. We do not mean to imply that a simple time comparison is the test. However, reason and perspective are important.

The trial court carefully performed the task of balancing the wide latitude afforded the prosecutor in vigorously arguing his case while holding in check any over zealousness which might otherwise have jeopardized appellants' right to a fair trial. When defense counsel objected to the prosecutor's argument, the court promptly ruled thereon. When objections were sustained,

the court advised the jury that the comments of counsel were not evidence. Finally, the court formally instructed the jury that "Statements made by the attorneys during the trial are not evidence. . . . " (CALJIC No. 1.02.)

In order to warrant reversal, it must be determined that the alleged misconduct has prejudiced appellants' right to a fair trial. In this case, the evidence against appellants was overwhelming. Defense evidence was unpersuasive. If the prosecutors' comments had not been made, it is not reasonably probable that a result more favorable to appellants would have occurred. (*People v. Milner* (1988) 45 Cal.3d 227, 245.) Reversal is required only where egregious misconduct infects the trial with such unfairness as to make a conviction a denial of due process; or, it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Hill, supra,* 17 Cal.4th at p. 819; *People v. Warren* (1988) 45 Cal.3d 471, 480; *People v. Kelley, supra,* 75 Cal.App.3d at p. 690.)

We conclude that the conduct of the prosecutors, individually or cumulatively, does not require reversal of the judgments of conviction.

IV. Jury Instructions

Appellants challenge various instructions given by the trial court, as follows:

CALJIC No. 3.01

Appellants contend that CALJIC No. 3.01 does not accurately reflect the Penal Code section 31 definition of aiding and abetting in that the use of the disjunctive "or"

in CALJIC No. 3.01 would allow the jury to convict on the basis of a finding of aiding *or* abetting as distinguished from the statutory conjunctive aiding *and* abetting. This argument was specifically rejected in *People v. Campbell* (1994) 25 Cal.App.4th 492, pages 410-414. We agree.

CALJIC No. 8.27

Appellants contend the trial court erred in using CALJIC No. 8.27. Appellants' reliance upon *People v. Pulido* (1997) 15 Cal.4th 713 is misplaced. The facts in *Pulido* are distinguishable from the facts before this court, to wit: the appellant in *Pulido* joined in the robbery enterprise *after* the homicide. In this case, the homicide occurred while the attempted robbery and burglary were in progress. Respondent correctly argues that *People v. Escobar* (1996) 48 Cal.App.4th 999 does survive *Pulido;* and, that CALJIC No. 8.27 is actually approved in *People v. Pulido, supra,* 15 Cal.4th at pages 728-729, for appropriate fact situations – such as this case. Appellants' challenge to CALJIC No. 8.27 is without merit.

CALJIC No. 8.80.1

Appellants argue that the statutory phrase "reckless indifference to human life," as incorporated into CALJIC No. 8.80.1, is unconstitutionally vague and overbroad; and, that CALJIC No. 8.80.1 is unconstitutionally vague as it fails to incorporate the element of implied malice. The California Supreme Court has specifically rejected these arguments in *People v. Estrada* (1995) 11 Cal.4th 568. We, of course, concur.

CALJIC No. 8.81.17

Appellants contend that the trial court gave CALJIC No. 8.81.17 in an erroneous form.

The court instructed:

"To find the special circumstance, referred to in these instructions as murder in the commission of attempted robbery and/or burglary, is true, it must be proved:

1. The murder was committed while a defendant was engaged in the commission or attempted commission of a robbery and/or burglary"

The claimed error is that the court omitted paragraph No. 2 from CALJIC No. 8.81.17, which reads: "2. The murder was committed in order to carry out or advance the commission of the crime of (attempted robbery and/or burglary) or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the (attempted robbery and/or burglary) was (were) merely incidental to the commission of the murder." (Parenthesis by this court.)

Relying on *People v. Green* (1980) 27 Cal.3d 1 and *People v. Thompson* (1980) 27 Cal.3d 303, appellants argue that, in finding the special circumstance to be true, the jury was required to make two findings: 1) That the murder was committed during the commission or attempted commission of a robbery or burglary; and 2) that the murder was committed to advance the commission of the attempted robbery/burglary or to facilitate the escape.

Under the facts of this case, neither *Green* nor *Thompson* support appellants' contention that it was reversible error for the trial court to omit paragraph No. 2 from CALJIC No. 8.81.17.

There is no evidence in the record to support so much as an inference that any of the appellants entered the McLoren property or confronted McLoren with the intent to kill anyone. The prosecution conceded this point at the outset of trial. The evidence is overwhelming that appellants intended to take McLoren's marijuana and/or money; that the fight involving McLoren, Hein and the Holland brothers arose as the result of appellants' larcenous actions; that Farris came to the aid of his friend, McLoren; and, that Jason stabbed both McLoren and Farris during the fight.

If there was evidence supporting an inference that the burglary and attempted robbery were incidental to the killing, then it would be reversible error to omit paragraph No. 2 of CALJIC No. 8.81.17. However, when the evidence is overwhelming that the killing was incidental to the underlying crimes of burglary and attempted robbery, it is entirely appropriate to omit paragraph No. 2 of CALJIC No. 8.81.17. (*People v. Kimble* (1988) 44 Cal.3d 480, 499-504.)

In this case, there is no evidence that reasonably or rationally suggests that appellants attempted to take McLoren's property as a mere incident to murdering him or Farris. Instead the evidence points convincingly to a primary intent to take property which degenerated into a killing. Appellants remained in the presence of their victims and exited the premises only after their victims ran

from the fort and escaped from appellants' assault. Appellants were engaged in the commission of the attempted robbery and burglary until they exited the McLoren property and drove away in Velardo's truck. (*People v. Williams* (1994) 30 Cal.App.4th 1758, 1763.)

This issue was directly answered contrary to appellants' contentions in *People v. Kimble, supra,* 44 Cal.3d at pages 499-504. In clarifying *Green* the Supreme Court held that, in a case where there is substantial evidence to show that the underlying crimes were not incidental to the murder, there is no sua sponte duty for the trial court to give paragraph No. 2 from CALJIC No. 8.81.17. (The Supreme Court specifically declined to discourage trial courts from giving paragraph No. 2 as a matter of course in all cases.) (*Id.* at p. 501, fn. 16.)

Appellants' reliance upon *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348] is not persuasive. The *Apprendi* decision does not change our conclusions regarding the use of CALJIC No. 8.81.17 in light of the facts herein.

The instruction as given correctly and adequately explained the general principle of law requiring a determination as to whether or not the murder was committed during the commission or attempted commission of a robbery and/or burglary. There was no error.

V. Waiver(s) of Issues on Appeal

Respondent urges this court to rule on its contention that appellants waived issues of instructional errors on appeal by failing to object, in fact acquiescing, to the

manner in which the instructions were given by the trial court. Since determinations on the merits are possible, it is unnecessary for us to address this intriguing question. We, therefore, respectfully decline doing so.

VI. *Wheeler Batson* Motions

Appellants contend that the trial court erred in denying motions pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79. Appellants argue that the prosecution exercised its peremptory challenges in a pattern designed to exclude female prospective jurors thereby depriving them of their constitutional rights to an impartial jury and equal protection of the law.

"When a trial court denies a *Wheeler* motion without finding a prima facie case of group bias the reviewing court considers the entire record of voir dire. [Citations] . . . [W]e examine the record for evidence to support the trial court's ruling. Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with 'considerable deference' on appeal. [Citations.] If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm. [Citation.]" (*People v. Howard* (1992) 1 Cal.4th 1132, 1155.)

The record of voir dire has been reviewed de novo. First, we agree with the trial court finding that the defense did not present a prima facie case that the prosecutor exercised peremptory challenges based upon a group bias. Second, the record of voir dire does support

legitimate reasons for peremptory challenges. (*People v. Box* (2000) 23 Cal.4th 1153, 1185-1190.)

Appellants' *Wheeler-Batson* contentions are without merit.

VII. Judicial Bias

Appellants contend that the trial court's rulings and admonitions to the jury reflect a pro-prosecution and/or anti-defense bias. Appellants merely cite rulings and admonitions with which they disagree. It is possible that the admonitions about which appellants complain could actually have worked in their favor.

There is nothing in the record to support appellants' claim of judicial bias. It is wholly without merit.

VIII. Juror Misconduct

Appellants contend the trial court erred in denying their motions for mistrial and for a new trial on the ground of alleged juror misconduct. Appellants requested an evidentiary hearing in connection with their claims of jury misconduct. The motions for a new trial were denied without holding the requested evidentiary hearing.

The daughter of original Juror No. 3 attended a few days of trial as an observer, went to lunch with her mother (No. 3) and five other jurors and sat in open court with the family of victim Farris. Upon, inquiry by the court, the daughter of Juror No. 3 identified her relationship to Juror No. 3, stated she was acquainted with Farris' brother, Travis, and specifically stated that she had not discussed the case with anyone, including her mother

(No. 3), the five jurors at lunch or the Farris family. Juror No. 3 confirmed to the court that there had been no discussion of the case. The court denied appellants' request to excuse Juror No. 3 and denied appellants' motion for a mistrial.

At a later time, Juror No. 3 stated to the court that she feared for the safety of her daughter and herself in the event of a conviction, but that she could and would remain fair and impartial; and, assured the court that she could and would deliberate without reference to her fears. The court again denied appellants' request to excuse Juror No. 3 and denied appellants' motion for a mistrial.

At an even later time, Juror No. 3 told the court that for a variety of reasons relating to her daughters' being identified in court and the questioning thereon, she could not concentrate and could not be fair and impartial. The court excused Juror No. 3, seated one of the alternate jurors and denied appellants' motion for a mistrial.

All of the forgoing events relating to original Juror No. 3 occurred before the prosecution rested its case. There is nothing in the record to suggest that the remainder of the jury was tainted in any manner by any of the events involving Juror No. 3 or her daughter. Any suggestion to the contrary is sheer speculation.

On the morning of the day when verdicts were returned, the jury inquired of the court as to contact with the media, contact with the attorneys, contact with the families and the security of their personal information. The court responded to each of their questions. Verdicts were returned later that day. This does not indicate juror

misconduct. On the contrary, it is an expression of understandable, legitimate concern by a group of citizens serving as jurors in a lengthy, high profile criminal case.

The court gave CALJIC No. 17.40, which reads, in part: "Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors. [¶] Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision."

Approximately two months after verdicts were returned and the jury was excused, Juror No. 10 sent a letter to the court, in which the juror stated, inter alia, "Admittedly, I was a cause of 2 days deliberation because I wasn't sure we had enough to go with 'intent to-steal' which was the key to this case. *Reasons given by eleven were very reasonable and good as mine but your instruction says that if both were reasonable numbers win. Am very comfortable with my decision.* We became very understand (sic), thoughtful, diligent as days went by. We gave our best. This was a very good group." (Emphasis and italics added.) The court sent copies to all counsel.

The letter from Juror No. 10 does not show misconduct per se. There is an ambiguity in that the underlined portion of the letter, *supra*, seems to be contrary to the court's instruction. (CALJIC No. 17.40.) On the other hand, the italicized portion of the letter, *supra*, suggests that Juror No. 10 changed her/his position as "*my decision*" and was comfortable with it. If the latter is correct, there is no misconduct.

The trial court found that the letter reflected the juror's " . . . mental processing, which is not attackable to set aside a verdict or a new trial issue."

In connection with appellants' motion for a new trial, the trial court denied appellants' request to disclose juror identity information pursuant to Code of Civil Procedure sections 206 and 237. Appellants relied solely on the quoted portion of the letter from Juror No. 10, *supra*, as good cause for the requested section 206/237 disclosure.

The trial court stated on the record its belief that there was a clear legislative intent to protect juror privacy and that disclosure was required only after a showing of good cause. The court found that the quoted portion of the letter, *supra*, did not constitute good cause.

While reasonable minds may differ with the trial court's conclusions regarding good cause and its ruling on the request to disclose juror identity information, the record clearly reflects that the court exercised its discretion reasonably and thoughtfully. The court did not abuse its discretion.

It was not error for the trial court to deny appellants' request for juror identity disclosure. It was not error to deny appellants' motion for a new trial on the grounds of alleged juror misconduct without an evidentiary hearing.

IX. Cross-examination Regarding McLoren's Civil Liability

Appellants contend the trial court abused its discretion in sustaining objections to cross-examination propounded to McLoren regarding his possible civil liability

for the death of Farris. Further, appellants contend the trial court abused its discretion in denying a motion to continue the *People v. Dillon* (1983) 34 Cal.3d 441 hearing pending investigation of the civil case. These contentions are without merit.

Appellants' suggest that potential civil liability, i.e., financial interests, might have cast doubt on McLoren's testimony. This is, at best, speculation and conjecture. There is nothing in the record giving rise to even a suspicion that the McLoren family would have civil liability exposure for a death resulting from the intentional misconduct of third parties.

Furthermore, the testimony of Jason (a witness called on behalf of all appellants) to a large extent corroborated the testimony of McLoren with respect to the events which occurred in the fort. Their testimony differs materially only as to the issue of intent. The "intent testimony" of Jason that, while in an intoxicated condition, he "believed" appellants were going to purchase marijuana from McLoren is of no greater persuasive force than was McLoren's "intent testimony," assuming arguendo, that McLoren would have acknowledged possible civil liability.

Overwhelming evidence supports the convictions for the underlying offenses without McLoren's "intent testimony." Any error was harmless.

There is nothing in the record to support appellants' contention that the trial court erred in denying appellants' motion to continue the *Dillon* hearing. The trial court exercised its discretion appropriately.

X. Speedy Trial Rights

Appellant Hein contends he was denied his constitutionally guaranteed right to a speedy trial. There is no merit to appellant's contention.

Hein was arraigned on June 21, 1995. As of that date, none of the other appellants had been joined with Hein as co-defendants. Hein's first trial date was set for August 14, 1995. The prosecution and defense agreed that August 21, 1995, would be the sixtieth day for trial.

Appellant Jason was arraigned on July 27, 1995. The court joined Hein and Jason for trial and set August 21, 1995, as the trial date. The court acknowledged that the remaining appellants were yet to have preliminary hearings etc. and that further continuances were likely in the event of consolidation.

Ultimately, the court consolidated all appellants for trial over Hein's objection. The court consolidated the cases because the theory of the prosecution was that appellants had committed a felony murder while acting in concert.

The court granted several trial continuances over Hein's objections. The court found good cause existed for each continuance such as pending juvenile court issues, co-defense counsel needing additional preparation time, co-defense counsel being engaged in other trials, unresolved discovery issues and similar grounds espoused by co-defense counsel. Some co-defendants waived time and objections to the requested continuances. The prosecution advised the court that, if so required, it was at all times prepared to try only the Hein case notwithstanding the

substantial duplication of efforts, witness hardship and consumption of court resources.

The continuances delayed Hein's trial for six months. Hein objected to each requested continuance. His motion to dismiss was denied. This court denied his petition for writ claiming violation of speedy trial rights.

The trial court did not abuse its discretion in finding good cause for the continuances requested by co-defendants. The trial court correctly balanced the Penal Code section 1098 mandate for joint trials with appellants' section 1382 speedy trial rights. The trial court did not abuse its discretion in finding good cause for the continuances. (*Greenberger v. Superior Court* (1990) 219 Cal.App.3d 487.)

XI. Evidence Regarding "Gumbys" and Failure to Hold a Hearing Regarding Security Measures

After extensive pretrial hearings, the trial court ruled that evidence of appellants' gang membership, if any, was insufficient and therefore inadmissible; that the fact of gang membership, if any, was irrelevant; and, that evidence of gang membership, if any, was inadmissible under Evidence Code section 352(b). However, the court also allowed expert testimony regarding street gangs with an explanation of what "Gumbys" was, i.e., a street gang known in the local community.

One of the charges against appellants was robbery or attempted robbery, to wit the taking of property by force or fear. The trial court properly allowed evidence of Micah's shouted statement to McLoren, "You want shit with Gumbys, ese?" as part of the operative facts in the

alleged robbery. Absent the expert testimony regarding the local meaning of the word "Gumbys," the prosecution would have been left arguing force and fear through the threat of a cartoon character or flexible rubber doll. The trial court correctly avoided such an absurdity.

Appellants contend the prosecution misrepresented its intended use of the gang expert testimony, referring to the Semow cross-examination of Jason and the prosecutors' closing argument. These issues are treated above under the "Prosecutorial Misconduct" heading.

The trial was held in the Malibu courthouse, which did not at that time have weapons screening devices at the entrance. The case had a very high public profile. Print and electronic media covered it daily. Due to the lengthy estimate of trial time, several panels of prospective jurors were required. At first, prospective jurors were not wearing identification badges and counsel were unknown to court security personnel.

The sheriff department's court security personnel recommended that all persons entering the courtroom, including prospective jurors, but excluding counsel and law enforcement, be required to pass through weapons screening. The trial court accepted this recommendation. For a short time at first, hand held magnetometers were used. Thereafter, stationary, upright magnetometers were used.

The trial court explained to the panels of prospective jurors that the screening procedures were a standard requirement and that they were not to draw any inferences from them. The court invited counsel to either

make further inquiry on the subject or to submit questions for inquiry by the court. Defense counsel did not make such inquiry, did not submit questions to the court, did not object to the security procedures and did not request a hearing.

The issue is raised for the first time on appeal. The issue is waived.

Appellants' analogy to the use of shackles or other security devices on a defendant does not apply. Here, the appellants were not singled out and made to appear as security risks. All persons entering the courtroom, except counsel and law enforcement, passed through the magnetometers. Security screening is now a fact of life experienced by the public in airports, public buildings, sporting events, some schools and most courthouses.

The trial court has broad discretion over the control and security of its facilities. That discretion was not abused in this case.

XII. Constitutional Challenge to Penal Code Section 190.2, Subdivision (d)

Appellants contend Penal Code section 190.2, subd. (d) is unconstitutionally vague, over broad, arbitrary, over inclusive and fails to properly narrow the class of offenders falling within its ambit, both facially and as applied. This issue is discussed above with respect to CALJIC No. 8.80.1.

The California Supreme Court has specifically rejected these contentions. (*People v. Estrada, supra,* 11

Cal.4th 568 citing and discussing *Tison v. Arizona* (1987) 481 U.S. 137 and *Enmund v. Florida* (1982) 458 U.S. 782.)

Appellant Hein cites nothing in the record to support his ipse dixit assertion that the Los Angeles Police Department influenced the district attorney's filing decisions in this case. These gratuitous remarks are ignored by this court.

XIII. Penal Code Section 654

Appellant Micah contends the trial court erred in imposing consecutive terms for the burglary (4 years) and murder (25 years to life) convictions. He argues that the burglary/attempted robbery/murder were all parts of an indivisible course of conduct. Thus, Penal Code section 654 compels imposition of sentence for only one of the convictions, but not more than one.

We do not agree. The trial court correctly applied section 654 by imposing and staying a two-year term for the attempted robbery conviction, which was an offense arising from the same conduct directed at the same victim as the burglary conviction. The killing of Farris, however, was an act directed at a person not the victim of the underlying burglary/attempted robbery offenses. Thus, section 654 does not apply to the punishment imposed for the murder conviction. (*People v. Young* (1992) 11 Cal.App.4th 1299, 1311-1312.)

XIV. Sufficiency Of The Evidence To Sustain Felony Murder Convictions

Appellants contend that the evidence is insufficient as a matter of law to sustain felony murder convictions. We do not agree.

" 'To determine whether there is substantial evidence to support a conviction . . . [the reviewing court] . . . must view the record in a light most favorable to conviction, resolving all conflicts in the evidence and drawing all reasonable inferences in support of conviction. [The reviewing court] . . . may conclude that there is no substantial evidence in support of conviction only if it can be said that on the evidence presented no reasonable fact finder could find the defendant guilty on the theory presented. [Citation.]' " (*People v. Campbell, supra,* 25 Cal.App.4th at p. 408.)

Substantial evidence supports the felony murder convictions of all appellants. As a group, appellants were present during and/or involved in the Moulder incident. As a group, appellants rode in Velardo's truck to the McLoren property. As a group, appellants entered the McLoren property by hopping the fence and proceeding directly to the fort. As a group, appellants stood in close proximity to Micah as he attempted to pull open the desk drawer. As a group, appellants stood in close proximity to the initial Micah McLoren verbal confrontation. Within seconds thereafter, Hein entered into the verbal confrontation with McLoren and the physical altercation began. Appellants Micah, Jason and Hein were active participants in the fight. Jason admitted stabbing both McLoren and Farris during the fight. As a group, all appellants left

the McLoren property, talking with each other and smiling. As a group, appellants boarded Velardo's truck and left the scene.

Miliotti did not withdraw from the action, leave the premises before commission of the crime(s) or do anything to prevent the commission of those crimes.

Clearly, the jury found the fight and stabbings to be parts of one continuous course of criminal conduct. Such a finding is the only reasonable conclusion under the facts before this court.

The felony murder conviction of appellant Miliotti could only have been based upon the finding that he was an aider and abettor to the underlying felonies of burglary and attempted robbery. The issues are whether or not he shared the intent requisite to the underlying felonies, whether or not he had the requisite knowledge of the perpetrators' unlawful purpose and whether or not he intended to aid and abet in the commission of that unlawful purpose. These issues are fundamentally questions of fact for jury determination, i.e., was Miliotti merely a casual observer or an aider and abettor?

Counsel for Miliotti argued at length that Miliotti was simply in the wrong place at the wrong time. In other words, that, although he was present, there was no evidence involving Miliotti in the Moulder incident; that, although present at the fort, Miliotti merely stood at the doorway; and, that there was no evidence that Miliotti participated in the attempt to take marijuana or was physically involved in the fight. Defense counsel argued the exclusionary language of CALJIC No. 3.01, *infra*.

The trial court instructed the jury as to the equal guilt of principals in a crime, including those who directly or actively commit the crime and those who aid and abet therein. (CALJIC No. 3.0) The trial court also instructed the jury as to the definition of aiding and abetting, including that which aiding and abetting is not (CALJIC No. 3.01): "Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting;" and, "[m]ere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting."

The court also instructed the jury, "[i]f a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of robbery and/or burglary, all persons who either directly or actively commit the act constituting the crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental." (CALJIC No. 8.27; approved in *People v. Pulido, supra,* 15 Cal.4th at p. 728.)

The evidence regarding Miliotti's role in the events at the fort was conflicting. The jury resolved this conflict, applied the law as instructed by the court and convicted Miliotti. It would be reasonable to infer from the evidence of Miliotti's conduct that he assumed his position in the doorway, in close proximity to McLoren, to intimidate McLoren, to block McLoren's exit and/or to act as a lookout.

While it is generally correct that neither mere presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission, "(a)mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense." (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094; *People v. Campbell, supra,* 25 Cal.App.4th at p. 409.)

There is substantial direct and circumstantial evidence to support the convictions of all appellants.

XV. Sufficiency Of The Evidence For Special Circumstance Finding

Appellants contend that the evidence is insufficient to support the special circumstance finding. (Pen.Code, § 190.2, subd. (d).)

The stringent standard of review for an insufficiency of the evidence contention is found in *People v. Campbell, supra,* 25 Cal.App.4th at page 408.

The jury was instructed that it could only find the special circumstance to be true if they found beyond a reasonable doubt (1) that the defendant with the intent to kill aided and abetted any actor in the commission of the first degree murder; *or,* (2) that the defendant with reckless indifference to human life *and* as a major participant aided "or" abetted in the commission of the attempted robbery and burglary which resulted in the death of Farris. (CALJIC No. 8.80.1; Pen.Code, § 190.2, subd. (d); *Tison v. Arizona, supra,* 481 U.S. 137.)

Although a death penalty case, the opinion in *Tison* is helpful in weighing the sufficiency of the evidence for application of the special circumstance provisions of Penal Code section 190.2(d). In *Tison* the majority opinion discusses the significant overlapping of the "major participant" and mental state requirements. In other words, the greater the defendant's participation, the more likely he acted with reckless indifference to human life.

Appellant Jason entered the McLoren property in possession of a pocketknife. He admits intentionally stabbing both McLoren and Farris with that knife. Jason killed Farris while engaged in the commission of an attempted robbery and burglary. There is abundant evidence supporting the special circumstance finding as to Jason.

Both appellants Hein and Micah were active participants in the attempted robbery and burglary that culminated in the death of Farris. Both Hein and Micah continued their violent, assaultive behavior before, during and after Jason shouted "Let's get this fucker," referring to McLoren. The stabbing of Farris occurred immediately, without hesitation, following the stabbing of McLoren. There is ample evidence to support the jury findings that Hein and Micah were "major participants" and that they acted "with reckless indifference to human life."

The evidence as to appellant Miliotti presents a more difficult inquiry. Respondent argues that it may be inferred that Miliotti entered the fort and actively participated in the fight. However, the evidence is persuasive that Miliotti did not enter the fort, but merely stood in the

doorway during the activities inside the fort. The only evidence placing Miliotti inside the fort is the equivocal testimony of McLoren, who stated he thought Miliotti was in the fort, but didn't actually see him there. (On one occasion, the court struck such testimony as speculative. On another, no objection was raised or motion to strike made.) McLoren did testify that he actually saw Miliotti standing in the doorway. Jason, who was intoxicated throughout, testified that Miliotti only stood in the doorway and never entered the fort.

We find, as a matter of law, that the evidence is insufficient to support a finding that Miliotti was a major participant in the attempted robbery or burglary and that he acted with a reckless indifference to human life.

As to appellant Miliotti, the evidence is insufficient to support the finding of a Penal Code section 190.2(d) special circumstance.

XVI. Cruel or Unusual Punishment

Each appellant contends that the sentence imposed constitutes cruel or unusual punishment contrary to the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution. Appellants argue that the punishment imposed is disproportionate to the nature of the crime involved.

The United States Supreme Court has held that in non-capital cases the disproportionality test has exceedingly rare application under the federal constitution. (*Harmelin v. Michigan* (1991) 501 U.S. 957.) It is undoubtedly with this in mind that the parties have directed their

arguments to the California Constitution and the California Supreme Court opinion in *People v. Dillon, supra,* 34 Cal.3d 441.

The power to define crimes and prescribe punishments is a legislative function. The court may not subvert the legislative process unless the statute prescribes a penalty which is so severe in relation to the crime as to violate the constitutional prohibition against cruel or unusual punishment. The basic test "is whether the punishment is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*People v. Dillon, supra,* 34 Cal.3d at p. 478.)

"The main technique of analysis under *Dillon* is to examine the nature of the offense and the nature of the offender. (34 Cal.3d at p. 479.) With respect to the nature of the offense, the court considers the offense not only in the abstract but also the facts of the crime in the particular case, 'including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts.' (*Ibid.*) With respect to the nature of the particular person before the court, the question is whether the punishment is 'grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.' (*Ibid.*)" (*People v. Young, supra,* 11 Cal.App.4th at p. 1308; *In re Lynch* (1972) 8 Cal.3d 410, 425-428; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1195-1200.)

The majority opinion in *Dillon* remains the law of this state and is controlling in this case. Generally, there are

factual similarities between this case and *Dillon*. The majority of the California Supreme Court in *Dillon* appears to have been particularly concerned with the personal characteristics of defendant Dillon, to wit: age, maturity, absence of a criminal history and his individual culpability in the crime. Accordingly, each appellant will be considered individually.

Jason at the time of the crimes was legally an adult. He was four months over the age of eighteen years. His criminal record involved a non-detained juvenile petition for vandalism/graffiti (1993) and a pending misdemeanor for receiving stolen property (Dismissed by the trial court after sentencing, herein). Jason frequently used alcohol and marijuana. He experimented with other drugs. Jason was the victim of physical and emotional abuse by a stepfather.

Jason was the perpetrator of the Moulder incident, which occurred within an hour before the crimes under consideration. He was an active participant in the burglary and attempted robbery. Jason is the person who carried and drew the knife, inflicted multiple, serious wounds upon McLoren and struck the fatal blows to Farris. The punishment imposed upon Jason, life without possibility of parole, is neither cruel or unusual.

Hein was at the time of the crimes legally an adult. His age was eighteen years, four months. His criminal record involved one juvenile diversion for shoplifting. Hein was a habitual user of drugs and alcohol. He was an active participant in the later intimidation phase of the Moulder incident. He was an active participant in the burglary and attempted robbery. He was physically

involved in the fight with McLoren and beat Farris in the head and face after Farris had been stabbed. The punishment imposed upon Hein, life without possibility of parole as an aider and abettor in a felony murder, does not rise to the level of cruel or unusual punishment under the *Dillon* test.

Appellant Micah was fifteen years old at the time of the crimes. His juvenile record was for burglary and malicious mischief/vandalism in 1990 (diverted); battery in 1992 (diverted); runaway in 1993 (counseled and released); entry on school grounds without registering and battery in 1994 (nondetained petition). Micah was a frequent user of alcohol and drugs. He was a disciplinary problem and truant in his schools. He was diagnosed with attention deficit disorder (A.D.D.) and had suffered physical abuse by his stepfather. Micah actively participated in the later intimidation phase of the Moulder incident.

Micah led the group foray into the McLoren property and into the fort. He attempted to open the locked desk drawer containing marijuana and money. He shouted the intimidating words demanding the keys from McLoren and was the first of the appellants involved in the physical fight, which culminated in the stabbing of McLoren and death of Farris.

Micah, although two years younger than defendant Norman Dillon (fifteen years vs. seventeen years), was not the immature, criminal record free youth who was the subject of *Dillon*. Although not a hardcore criminal, Micah's record consists of four law enforcement contacts, including informal probation, beginning when he was ten

years old. Arguably, Micah was headed in the direction of serious criminality. On May 22, 1995, he arrived there when Farris died.

The facts in *Dillon* involve a sudden, frightened, panicky, quick turn and firing of fatal shots at a distant victim who was armed with a shotgun. The facts involving Micah are distinguishable. Micah knowingly became involved in an up-close and personal (to McLoren) burglary and attempted robbery, which quickly evolved into hand-to-hand, nose-to-nose, person-to-person physical fighting with unarmed persons, which in turn quickly escalated into a stabbing and killing by Micah's brother, Jason. Such facts do not give rise to the "exquisite rarity" of a finding that the sentence imposed on appellant Micah was grossly disproportionate to the crime committed and his culpability therein. (*People v. Weddle, supra,* 1 Cal.App.4th at pp. 1195-1200.) Imposition of a sentence of 29 years to life does not constitute cruel or unusual punishment (Cal. Const., art. I, § 17.)

Miliotti was seventeen years old at the time of the crimes. He was eleven days away from his eighteenth birthday. His only previous law enforcement contact was a juvenile curfew violation. Miliotti frequently used alcohol and marijuana. Although the jury found him to be more than merely present as a passive observer, the evidence of the extent of Miliotti's involvement in the events at the fort is equivocal and contradictory.

Both Dillon and Miliotti were seventeen-year-old high school students at the time of their respective crimes. Both Dillon and Miliotti had no criminal record.

Miliotti's involvement in the crimes herein was substantially less than that of defendant Norman Dillon, who planned, organized the crime, and was the actual killer in *People v. Dillon, supra,* 34 Cal.3d at pp. 451-452, 500-501.

Defendant Norman Dillon was convicted of first degree felony murder and attempted robbery and was sentenced to life in prison (a parole eligible sentence). The majority of the California Supreme Court held, " . . . in the circumstances of this case the punishment of this defendant by a sentence of life imprisonment as a first degree murder violates article I, section 17, of the Constitution. . . . " (*Id.* at p. 489.)

Appellant Miliotti was convicted of burglary, attempted robbery and first degree felony murder plus special circumstance. He was sentenced to prison for life without possibility of parole plus four years. (An even more severe punishment than the parole eligible sentence imposed on Dillon.) The doctrine of stare decisis requires that we adhere to the decision in *Dillon* and find that the Miliotti sentence " . . . in the circumstances of this case . . . violates article I, section 17, of the (State) Constitution . . . " and is contrary to the prohibition against cruel or unusual punishment. (*Id.* at p. 489.)

As discussed above, the evidence is sufficient to support Miliotti's conviction of first degree murder committed in the course of a burglary and attempted robbery, but insufficient to support the Penal Code section 190.2(e) special circumstance. However, in accordance with *Dillon* (*id.* at p. 489), the degree of Miliotti's murder conviction

must be reduced to murder in the second degree. (Miliotti's claim that the trial court abused its discretion in a so-called *Dillon* hearing is moot.)

The doctrine of stare decisis has been clearly stated by the California Supreme Court: "Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. . . . The decisions of this court [California Supreme Court] . . . must be followed by all the state courts of California. . . . Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. . . . [Citations.]" (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 454, 456.) As to each appellant individually, we have adhered to the decision in *People v. Dillon, supra,* 34 Cal.3d 441. We respectfully urge that the California Supreme Court review the *Dillon* decision in the context of this case.

DISPOSITION

As to appellants Jason Holland, Brandon Hein and Micah Holland, the judgments are affirmed.

As to appellant Anthony Miliotti, the judgment is affirmed on the convictions of burglary and attempted robbery. The special circumstance finding (Pen.Code, § 190.2, subd. (d)) is stricken. As to the conviction of murder, the judgment is modified by reducing the degree of the crime to murder in the second degree and, as so modified, is affirmed. The cause as to appellant Anthony

Miliotti is remanded to the trial court with directions to arraign and pronounce judgment accordingly.

CERTIFIED FOR PARTIAL PUBLICATION

STOEVER, J.*

We concur:

LILLIE, P.J.

WOODS, J.

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* Assigned by the Acting Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B

Court of Appeal, Second Appellate District,
Division Seven – No. B106689
S095461

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

BRANDON HEIN et al., Defendants and Appellants.

(Filed Apr. 25, 2001)

Petitions for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed Januray [sic] 29, 2001, which appears at 86 Cal.App.4th 683. (Cal. Const., art. VI, section 14; rule 976, Cal. Rules of Court.)

GEORGE
Chief Justice